92-658

No. 92-

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

G. FRANKLIN LATHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
To the United States Court of Appeals for
the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 1992

QUESTION PRESENTED

Does the United States Court of Appeals have jurisdiction over a criminal defendant's appeal from the denial of a post-trial motion for judgment of acquittal, as a "final decision" under 28 U.S.C. § 1291, where the district court has granted the defendant's alternative motion for a new trial, at least where the government has appealed the order granting a new trial?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

G. FRANKLIN LATHAM respectfully petitions this Court for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit entered on May 29, 1992, dismissing his appeal from the order of the United States District Court for the District of New Jersey denying him a post-trial judgment of acquittal, while granting a new trial.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit wrote no opinion in support of its judgment order dismissing the petitioner's appeal. It is noted at 968 F.2d 15 (table). The district court's 43-page opinion explaining the

granting of a new trial and denial of judgment of acquital (Hon. John F. Gerry, Ch.U.S.D.J.), dated and filed May 30, 1991, is not published. It is Appendix C to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 29, 1992. Appx. A. The court of appeals' Order denying petitioner Latham's petition for rehearing with suggestion for rehearing in banc was entered on July 8, 1992. Appx. D. This petition is filed within 90 days of that date. Rule 13.1, 13.4. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 1291 of the Judicial Code provides, in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... except where a direct review may be had in the Supreme Court. ...

28 U.S.C. § 1291 (1988).

Amendment V to the United States Constitution provides, in pertinent part: "... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ....

STATEMENT OF THE CASE

This petition arises from cross-appeals of the orders on post-trial motions, granting a new trial "in the interest of justice," but denying a

motion for judgment of acquittal, following a jury's conviction of the petitioner, an official of the U.S. Agency for International Development, on five counts of making false claims against the United States, 18 U.S.C. § 287, for the living expenses of a dependent who had been evacuated from post.

a. Procedural History

After a jury trial in the United States District Court for the District of New Jersey (the Hon. John F. Gerry, Chief U.S.D.J., presiding), petitioner G. Franklin Latham was convicted on November 29, 1990, of all five counts in an indictment, filed January 9, 1990, charging him with making false, fictitious or fraudulent claims against an agency of the United States, in violation of 18 U.S.C. § 287. A jury convicted the

petitioner, a career fiscal officer of the U.S. Agency for International Development ("AID"), of falsely claiming certain living expenses of his dependent son following the youth's "authorized departure" (voluntary evacuation) from petitioner's post in El Salvador in the fall of 1987. The government contended that some $6900 of the payments received (over the course of several months in 1988) were not authorized by the State Department's Standardized Regulations (Government Civilians, Foreign Areas).

Petitioner filed timely motions for judgment of acquittal pursuant to Fed.R. Crim.P. 29(c) and for a new trial pursuant to Fed.R.Crim.P. 33. By opinion and order dated May 30, 1991, the district court denied the motion for acquittal, but granted petitioner a new

trial. Appx. B (order), Appx. C (opinion).

Both parties appealed. After briefing and oral argument, by judgment orders filed May 29, 1992, the court of appeals dismissed petitioner's appeal for lack of appellate jurisdiction and summarily affirmed the grant of a new trial. Appx. A. The court of appeals denied rehearing, Appx. D, but granted a stay of mandate pending the filing of this petition. Appx. E.

Statement of Lower Court Jurisdiction Under Rule 14.1(i). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. Whether the court of appeals had jurisdiction under 28 U.S.C. § 1291 is the issue presented in this petition. If it

had appellate jurisdiction, that jurisdiction was timely invoked by Notice of Appeal filed within ten days of the entry of the order appealed from. Fed.R.App.P. 4(b).

b. Statement of Facts

Petitioner served in 1987-1988 as Comptroller for the AID mission in El Salvador, one of the largest AID stations in the world. In that diplomatic position, he was entitled to certain employment benefits under the Standardized Regulations. In particular, in the event of the ordered evacuation or authorized departure of the employee or a covered dependent from the assigned post, the government would advance funds to pay the travel expenses and a per diem for the added expenses of having to leave the foreign post.

The parts of the Standardized Regulations at issue in this case flesh out a statutory standard, 5 U.S.C. §§ 5522-5523.[1] The current version of 5 U.S.C. § 5522(a) incorporates a 1980 amendment substituting the term "departure" for "evacuation" and supplementing prior language which had permitted evacuation only in response to imminent and life-threatening danger. The new subsection authorized the Secretary of State to order or permit departure for reasons which the Secretary determined to be "in the national interest." Id. §

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1. The State Department's Standardized Regulations were issued pursuant to a statutory mandate to "coordinate the policies and procedures" of the various agencies under this subchapter by developing "regulations necessary and appropriate to carry out the provision, accomplish the purposes, and govern the administration of this subchapter." Id. § 5527(a,b).

5522(a)(1).[2] The statute then goes on to authorize the establishment, pursuant to regulation, of payments "to or for the account of each employee ... whose departure is authorized or ordered under section 5522(a) ...." Id. § 5523(a)-(1)(A).[3] The witnesses unanimously agreed that for AID employees posted to El Salvador during the years at issue here, "evacuation" included "voluntary evacuation" of an employee's dependents, at the employee's discretion, and that

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2. Section 5522(a) provides, in pertinent part, that a federal agency may authorize advance payment of allowances to cover departure of the employee or his dependents from a foreign location either when "the Secretary of State determines it is in the national interest," § 5522(a)(1), or when "there is imminent danger to the life of the employee or the lives of the dependents or immediate family of the employee." Id. § 5522(a)(2).

3. This section further provides for benefits during the ensuing 60 to 180 days.

the policy was "liberally construed."

In connection with the authorized departure of an employee or his or her dependent, the employee is entitled under the Regulations to certain "evacuation payments," as defined in SR 600(105.f), for a period of up to 180 days. SR 600(121). Particularly, an authorized departure or evacuation entitles an employee to "special allowances," SR 600(130), which are designed "to offset any direct added expenses which are incurred by the employees [sic] as a result of his/her evacuation or the evacuation of his/her dependents." Id.

Petitioner's dependent son, Stephen Latham, had resided with his family at the petitioner's prior post in Costa Rica. From there, petitioner sent him to college in Philadelphia, utilizing a benefit known as "educational travel"

(which allows one round trip per year) to pay for transportation. While Stephen was away at college, petitioner was entitled to an "at-post" education allowance, because there was no "away-from-post" education program authorized for El Salvador mission personnel at the time. Over the Thanksgiving holiday in 1987, petitioner arranged for his son to come to El Salvador to be with the family but then to return to Philadelphia classified as a "voluntary departure." On the latter basis, petitioner then claimed the pertinent "special allowances," which was to the family's financial benefit as compared with Stephen's being away merely on educational travel.

Five vouchers totalling less than $7000, submitted between February and August 1988 to clear advances received for this purpose, were the basis of peti-

tioner's convictions in this case. See Appx. C-3 to -6. The government charged that these vouchers were "false claims" only in the sense that the prosecution contended that petitioner knew the expenses he was being reimbursed for were not "direct added expenses" compensable under the Standardized Regulations in these circumstances.

REASON FOR GRANTING THE WRIT

The Circuits are in conflict on the question whether there is appellate jurisdiction to review an order denying a criminal defendant's post-trial motion for judgment of acquittal, where an alternative motion for a new trial is granted at the same time.

Petitioner contended below that the denial of his post-trial motion for judgment of acquittal was a "final decision," 28 U.S.C. § 1291, for appellate jurisdiction purposes, of the question of evidentiary sufficiency at

trial. No judgment of conviction and sentence would ever be entered incorporating that order -- the usual kind of "final decision" in a criminal case -- because a new trial was granted at the same time. The court of appeals dismissed for lack of appellate jurisdiction, but at least three other circuits have analyzed this and analogous problems and have given their approval to such appeals. The disagreement in the circuits is grounded in different readings of this Court's decision in Richardson v. United States, 468 U.S. 317 (1984). The Court should grant a writ of certiorari to resolve the split in the circuits on this important and recurring question of federal appellate jurisdiction.

In Richardson, the jury was unable to reach a verdict, resulting in a

mistrial. After the case was set for retrial, the defendant moved to dismiss, contending that retrial would violate the Double Jeopardy Clause based on the insufficiency of the evidence presented at the first trial. This Court unanimously held that the order denying that motion was "final" for purposes of 28 U.S.C. § 1291, and therefore appealable. Because of their double jeopardy implications, the Court held, such orders fall within the "collateral order" exception to the final judgment rule. Id. at 321-22. In so holding, the Court followed the reasoning of its earlier decision in Abney v. United States, 431 U.S. 651 (1977), in which the Court had held that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds was appealable under the doctrine first articulated in Cohen v. Beneficial

Industrial Loan Corp., 337 U.S. 541 (1949). See generally Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989). Only if a motion to dismiss on double jeopardy grounds does not present a "colorable" argument is appellate jurisdiction lacking. Richardson, 468 U.S. at 322.

The circuits disagree about the implications of Richardson for appeals like petitioner's, where post-trial acquittal was denied but a new trial has been granted. Most recently, in United States v. Wood, 950 F.2d 638 (10th Cir. 1991) (per curiam), the court gave full consideration to the appellate jurisdiction question in a procedural posture identical to petitioner's case, and upheld jurisdiction under § 1291: "Applying the collateral order doctrine's three-part test to the defendant's issues

on cross-appeal ..., we hold that the district court's denial of defendant's motion for a judgment of acquittal is a final decision within the meaning of 28 U.S.C. § 1291." Id. at 641. The court found that the defendant's claim there, which was the same as the petitioner's contention here, presented a "colorable" double jeopardy argument for appellate review. The later resolution of that argument on the merits against the defendant-appellant, see United States v. Wood, 958 F.2d 963, 967-71 (10th Cir. 1992) ("Wood II"), did not retroactively strip the court of appellate jurisdiction.[4]

In United States v. Szado, 912 F.2d 390, 391-93 (9th Cir. 1990), the court

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4. Even though under Wood II, the Tenth Circuit would now refuse jurisdiction of a later case of this kind, in the Fourth and Ninth Circuits, as discussed below, jurisdiction would be upheld.

gave full consideration to the issue in an analogous posture. That court held appealable, as a "collateral order," a district judge's decision, on appeal from a conviction before a Magistrate, that the evidence was sufficient but that a new trial was required (because of denial of the right to jury trial).[5] In addition, the Fourth Circuit has upheld jurisdiction of an appeal from the denial of a defendant's motion for judgment of acquittal under the Cohen doctrine, in a decision postdating, but curiously not citing, Richardson and Abney. United

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5. The Szado court expressly followed an earlier Third Circuit case, United States v. McQuilkin, 673 F.2d 681 (3d Cir. 1982), holding it still to be good law. In petitioner's case, on the other hand, the court below apparently believed that McQuilken had been overruled by Richardson. See 468 U.S. at 321 (cert. granted in Richardson partly to determine whether McQuilken was rightly decided under the double jeopardy clause.

States v. Greene, 834 F.2d 86, 89 (4th Cir. 1987).[6] These cases respect the limitations of the collateral order rule, because the due process protection which guarantees acquittal after one trial upon insufficient evidence is a "right the legal and practical value of which would be destroyed if it were not vindicated

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6. In petitioner's case, as in Greene and Wood, the government appealed the other aspect of the district court's order, granting a new trial. Unlike the situation in Greene, however, petitioner's notice of appeal was timely filed within the 10 days after entry of the district court's order. It is therefore not necessary in this case to resolve the related conflict in the circuits on the question whether 18 U.S.C. § 3731, which allows the government's appeal, implicitly authorizes a defendant's cross-appeal of the denial of the motion for judgment of acquittal. Compare Greene, supra (holding that it does), with United States v. Coleman, 862 F.2d 455, 457 (3d Cir. 1988), cert. denied, 109 S.Ct. 2074 (1989) (dictum: government's appeal under § 3731 from order granting a new trial does not give rise to jurisdiction to review the sufficiency of the evidence at the behest of the defendant).

before [re]trial." Midland Asphalt, supra, quoting United States v. MacDonald, 435 U.S. 850, 860 (1978). On a hypothetical appeal after the retrial granted by the district court, as affirmed by the court below, the issue would the sufficiency of the evidence presented at the new trial, not what was presented at the first trial. Cf. United States v. Mechanik, 475 U.S. 66 (1986) (jury verdict after fair trial renders harmless any technical error in grand jury proceedings).

Despite finding that it had jurisdiction of the appeal, this Court in Richardson found no merit to the defendant's double jeopardy claim demanding dismissal of the charges, because "a trial court's declaration of a mistrial following a hung jury is not an event which terminates the original

jeopardy to which petitioner was subjected." 468 U.S. at 327. Thus, "[r]egardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial." Id. The Court stated that the defendant and Government are entitled to resolution of the case "by verdict." 468 U.S. at 327.

Under Richardson, an appeal from an order denying a motion for judgment of acquittal after the jury had failed to reach a verdict does not fall within the collateral order doctrine, because it does not threaten the defendant's double jeopardy rights and therefore does not implicate a "right not to be tried." See Midland Asphalt, supra. That is not petitioner's case; in the instant case, the trial was completed and the jury reached a verdict. In Wood I, supra, the

Tenth Circuit adopted this very distinction as controlling. 950 F.2d at 642. Compare United States v. Miller, 952 F.2d 866, 871-74 (5th Cir. 1992) (discussing Richardson and holding that it resolved cases of this kind adversely). At least, petitioner's case presents an argument with "colorable" double jeopardy implications which is not foreclosed by the decision in Richardson. See id., 468 U.S. at 326 n.6.[7] As elaborately

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7. This test, as stated in Richardson, is sometimes misinterpreted by the lower courts. The existence of jurisdiction depends not on making a colorable claim of jurisdiction, but rather on making a colorable claim on the merits. Here, the merits of petitioner's claim do not consist of a double jeopardy argument but rather of a sufficiency argument. The more-than-colorable nature of his sufficiency claims was amply demonstrated in his brief below, which showed that the evidence against him was insufficient in three different respects: (1) the vouchers charged in the indictment were not "claims against" the United States; (2) no claim he made was "false" under the governing regulations; and (3) criminal intent on his part was not proven.

discussed by the Tenth Circuit in both Wood opinions, the implications of this Court's decisions in Richardson and Lydon for cases in the instant context are not at all clear. Pursuit of the analysis requires confrontation of logical contradictions in the "waiver," "continuing jeopardy" and "termination of jeopardy" theories of current double jeopardy jurisprudence. Thus, the issue is at least a substantial one warranting a grant of certiorari to resolve the conflict in the circuits.

The outcome of the jurisdictional issue does not necessarily depend on whether the Tenth Circuit is right in its double jeopardy analysis in Wood II. Just because the double jeopardy clause would bar a retrial if the evidence were found insufficient on appeal, it does not

follow logically that sufficiency is reviewable under § 1291 only if the "first" jeopardy has formally terminated prior to that review. That much is clear from the "manifest necessity" mistrial cases (in which there has been no "termination" of "first jeopardy," yet this Court consistently has held retrial to be constitutionally barred where the declaration of mistrial was unnecessary). See United States v. Jorn, 400 U.S. 470 (1970); Downum v. United States, 372 U.S. 734 (1963); United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). See also United States v. Dixon, 913 F.2d 1305, 1308-09 (8th Cir. 1990) (jurisdiction sustained over appeal from denial of double jeopardy motion claiming no manifest necessity for mistrial); United States v. Bradley, 905 F.2d 1482, 1485-86 (11th Cir. 1990) (same), cert. denied,

111 S.Ct. 969 (1991).

The panel's decision below is not only bad law, but also bad policy. As the court noted in Wood I, where as in petitioner's case (and in Wood and Greene) the government cross-appeals from the order granting a new trial, the purposes of the final judgment rule are not ill-served by allowing the defendant's appeal to be heard at the same time. 950 F.2d at 641. Indeed, one of the purposes of the rule, judicial economy, may be enhanced. Ironically, if there is no jurisdiction to hear petitioner's appeal now he is placed in a worse position than the person whose post-trial motions are wrongly denied in their entirety. That person can raise both claims on direct appeal after sentencing and is then entitled to have the sufficiency issue decided first; the

sufficiency issue cannot be pretermitted on direct appeal by granting a new trial. Szado, supra, 912 F.2d at 393. Cf. United States v. Kozminski, 487 U.S. 931, 952-53 (1988) (considering whether evidence would be sufficient under correct interpretation of law before affirming remand for new trial). But see Miller, supra, 952 F.2d at 871, 873 (cataloging cases).

As this Court stated in Richardson, "allowing appeals such as this is completely consistent with the Court's admonition in Cohen that the words 'final decision' in § 1291 should have a 'practical rather than a technical construction.' Cohen, 337 U.S., at 546 ...." 468 U.S. at 322. The Tenth Circuit's ultimate conclusion in Wood II that a defendant-appellant in petitioner's situation (uniquely among

defendants convicted on insufficient proof) cannot ever have review of the sufficiency of the evidence assumes that the question on the merits, once appellate jurisdiction is established, is the validity of the double jeopardy claim per se, rather than of the sufficiency claim. That is simply wrong.

The real issue, at this stage of the case, is not whether petitioner's double jeopardy rights have been violated, but whether a court of appeals has jurisdiction under 28 U.S.C. § 1291 to hear his appeal. The answer to that question would have been different from that of the court below in at least two, if not three, other circuits.

The dismissal of petitioner's appeal can only be explained as being based on the view that this Court's cases undermine his arguments. But neither

Richardson nor Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 304-13 (1984), the only other case on which the government relied below in challenging jurisdiction,[8] is on point procedurally. But see Evans v. Court of Common Pleas, 959 F.2d 1227, 1235-37 (3d Cir. 1992) (discussing same cases and related issue in context of federal habeas review following state appellate court rulings), cert. pending, No. 92-5224 (filed July 13, 1992) (awaiting response at request of the Clerk); compare Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981) (habeas jurisdiction based on double jeopardy lies to chal-

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8. The government did not argue that petitioner's alternative motion for a new trial waived whatever double jeopardy objection he might have. That argument was unanimously put to rest in Chief Justice Burger's opinion for the Court in Burks v. United States, 437 U.S. 1 (1978).

lenge sufficiency of evidence where state courts have granted new trial).

Richardson did not involve an appeal from the denial of a motion for judgment of acquittal after trial, but rather an attempt to appeal from an order denying a motion to dismiss, prior to retrial, on grounds that double jeopardy barred the retrial because the evidence at the first trial had been insufficient. This Court upheld interlocutory appellate jurisdiction of that order. On the merits however, analyzing the double jeopardy jurisprudence on hung juries, the Court concluded that there could be no double jeopardy violation because jeopardy from the first trial had not terminated. Petitioner's jury did not hang, however, and nothing in Richardson addresses the question presented here: whether a conviction terminates jeopardy for these

purposes where the grant of a new trial, coupled with the denial of a motion for judgment of acquittal, prevents the conviction from being reduced to judgment or from being otherwise appealable by the defendant, or, even if it does not, whether the denial of the motion for acquittal is nevertheless a "final decision."

Justices v. Lydon does not resolve the jurisdictional question either. Lydon was convicted at the lower level of a trial de novo system and exercised his right to a new trial. This Court determined that Lydon had no right under the double jeopardy clause to a review of the sufficiency of the evidence presented at his Municipal Court bench trial before receiving the jury trial de novo to which he was entitled automatically. This holding was based on an analysis of the

two-tiered trial de novo system, which the Court carefully distinguished from the federal direct appeal involved in Burks v. United States, 437 U.S. 1 (1978), on which Lydon relied for his claim. The Court ruled that the trial de novo was simply the latter part of one continuous trial process, voluntarily elected by the defendant, not a second exposure to jeopardy. The ratio decidendi of Lydon is entirely inapplicable here, and does not support the order of dismissal below.

The only possible rationale for holding that petitioner's "first jeopardy" did not "terminate" with the return of the verdict would be the dissolution of that verdict in the grant of a new trial at his behest. But that theory is inconsistent with the holding in Burks as explained and distinguished

in Lydon. Burks held that an alternative claim for a new trial, raised on post-trial motions or appeal, did not waive the double jeopardy implications of a motion for judgment of acquittal or appellate challenge to sufficiency. The Lydon decision therefore does not defeat petitioner's claim.

Petitioner's present appeal does not arise from the denial of a motion to dismiss on double jeopardy grounds, but rather from the denial of his post-trial motion for judgment of acquittal. As the Tenth Circuit held in Wood I, that order is appealable under 28 U.S.C. § 1291 now, because the lower court's grant of a new trial means that the case will not proceed to a judgment of sentence from which the usual direct appeal could ever be taken. The order appealed from is as "final" as any "decision" arising out of

that trial is ever going to get. Because in this procedural posture the appeal is not interlocutory, the court below erred in dismissing the appeal. Certiorari should be granted to resolve the conflict in the circuits and to correct the error in the interpretation of this Court's precedents shared by the court below.

CONCLUSION

For the foregoing reason, petitioner G. FRANKLIN LATHAM prays that this Court grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dismissing his appeal from the denial of a judgment of acquittal.

Respectfully submitted,

PETER GOLDBERGER
PAMELA A. WILK
JAMES H. FELDMAN, JR.
Attorneys for Petitioner

October 6, 1992.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5483

UNITED STATES OF AMERICA,

v.

G. FRANKLIN LATHAM,

Appellant

Appeal from the United States District Court for the District of New Jersey
D.C. Criminal No. 90-00005-01
(District Judge: Hon. John F. Gerry, Chief Judge)

Argued: May 18, 1992

Before: BECKER, COWEN and GARTH, Circuit Judges.

JUDGMENT ORDER

It is hereby ADJUDGED AND ORDERED that the appeal is dismissed for lack of appellate jurisdiction.

BY THE COURT:

s/Edward R. Becker
Circuit Judge

Attest:

s/Sally Mrvos
Sally Mrvos, Clerk

Dated: **May 29, 1992**

ENTERED
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(Deputy Clerk)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Civil [sic] Action No. 90-05
v.	:	
G. FRANKLIN LATHAM,	:	ORDER
Defendant.	:	

This matter having come before this court upon motion of the defendant seeking acquittal, or in the alternative a new trial, and the court having considered the submissions, and for good cause shown;

It is on this 30th day of May, 1991, hereby ORDERED that defendant's motion for acquittal is denied.

It is further ORDERED that defendant's motion for a new trial is granted.

s/John F. Gerry
JOHN F. GERRY
CHIEF JUDGE

NOT FOR PUBLICATION

FILED
MAY 30, 1991
At 8:30 __.m.
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA:

v. : Criminal Action No. 90-5

G. FRANKLIN LATHAM : OPINION

GERRY, Chief Judge

On January 9, 1990, the defendant, G. Franklin Latham, was indicted on five counts of making false, fictitious or fraudulent claims to the United States Government in violation of 18 U.S.C. § 287.[1] Defendant was convicted of all

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1. The statute under which the defendant is charged states:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department of [sic] agency thereof, any claim upon or against [sic] shall be imprisoned not more than five years and shall be subject to a fine on the amount provided in this title.

five counts on November 29, 1990. He filed timely post-verdict motions for a new trial, pursuant to Fed. R. Crim. P. 33, on the ground that the prosecution withheld from him exculpatory evidence in its possession, or, in the alternative, that the undisclosed matter is newly discovered evidence. He also filed post-verdict motions for judgment of acquittal under Fed. R. Crim. P. 29(c), or for a new trial under Fed. R. Crim. P. 33. For the following reasons, defendant's motion will be denied in part and granted in part.

BACKGROUND

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18 U.S.C. § 287.

The requisite element of mental state is knowledge that the claim submitted to the Government is false, fictitious or fraudulent. United States v. Precision Medical Laboratories, Inc., 593 F.2d 434, 443-44 (2d Cir. 1978).

The background of this case involves defendant's service as an official in the United States Agency for International Development ["A.I.D."]. The indictment alleges that at all relevant times the defendant held the position of controller for the A.I.D. mission in San Salvador, El Salvador. A.I.D. employees, such as the defendant, receive salaries and are entitled to additional payments or allowances as provided for by the State Department's Standardized Regulations [hereinafter sometimes referred to as "SR" or "Regulations"] [attached as Exhibit A]. The Regulations applicable at the relevant time provided for special allowance in the event of an emergency evacuation or authorized departure of A.I.D. employees or their dependents from El Salvador for military or other reasons of national interest or because of

imminent danger to their lives. See Indictment of G. Franklin Latham, January 9, 1990, ¶ 4. Pursuant to the Regulations, A.I.D. employees could be paid for any direct expenses incurred as a result of his evacuation or the evacuation of his dependents. SR 600 (130). Such direct added expenses from evacuation included a subsistence expense allowance for a period up to 180 days after the evacuation or authorized departure. SR 600 (131).

The defendant was working for A.I.D. in San Salvador during the fall of 1987. Throughout the period covered in the indictment, the defendant's son, Stephen Latham, was attending college in Philadelphia, Pennsylvania. On November 25, 1987, the defendant's son allegedly travelled from Philadelphia to San Salvador to spend Thanksgiving with his

father. On December 1, 1987, the defendant's son returned to Philadelphia from San Salvador. The defendant's son allegedly used a prepaid round trip airline ticket to travel to and from San Salvador.

Between November 26, 1987 and August 16, 1988, the defendant allegedly submitted documents to A.I.D. concerning special payments and allowances, including claims for direct added expenses for subsistence under the Standardized Regulations associated with the departure of his son from El Salvador. On such claims, a total of $6,852.34 was allegedly paid by the Government into the defendant's account at a Pitman, New Jersey bank. On five occasions between February 26, 1988 and August 11, 1988, the defendant allegedly submitted travel vouchers and supporting documentation to

A.I.D. claiming entitlement to direct added expenses for the evacuation or authorized departure of his son in November-December of 1987. The indictment alleges that the defendant knew that such expenses were not direct added expenses compensable under the Standardized Regulations. Therefore, the indictment charged the defendant with five counts of submitting false or fraudulent documents to the Government under 18 U.S.C. § 287.

This court held a trial during the week of November 19, 1990. At trial, the defendant basically alleged that he filed the claims for his son's departure in accordance with the accepted practice of employees at the El Salvador mission, and that the Inspector General's Office of A.I.D. investigated his case and referred it for prosecution due to an intent to

discriminate against the defendant. The jury returned a verdict against the defendant on all counts on November 29, 1990.

With this in mind, we now turn to defendant's motions.

MOTION FOR A JUDGMENT OF ACQUITTAL OR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

The defense's motion for a judgment of acquittal, or in the alternative for a new trial, is before this court. The defense argues in their Memoranda that the failure of the prosecution to disclose evidence of two conversations between a deputy legal counsel for the A.I.D. Inspector General, Laurence Beck, Esq.,[2] and Harry Wilkinson, an A.I.D.

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2. Timothy J. Franchois, an auditor with the A.I.D. Office of the Inspector General, also participated in the July 7, 1989 conversation with Mr. Wilkinson.

employee, resulted in the suppression of exculpatory Brady material. Second, the defense asserts that the failure to disclose the "Wilkinson evidence" violated the court's pre-trial discovery orders. Third, the defense asserts that failure to disclose evidence of the Wilkinson conversation constitutes prejudicial prosecutorial misconduct warranting dismissal. Finally, the defense asserts that the information contained in Wilkinson's statement warrants a new trial since it is newly discovered evidence.

In opposition to defendant's motion, the prosecution contends that the Wilkinson statement is factually inaccurate, that there is no duty of disclosure of evidence or witnesses known or accessible to the defense; the statement is not exculpatory; and that the

Wilkinson statement has no bearing on the court's pretrial discovery order requiring disclosure of evidence relating to defendant's selective prosecution defense.

The prosecution has confirmed that there were two substantive conversations between Laurence Beck, Esq. of the IG's Office, and Harry Wilkinson. The first occurred on or about July 7, 1989, and the second occurred on or about June, 1990. Affidavit of Laurence Beck, ¶ 3, 9; Affidavit of Timothy Franchois, ¶ 3. In their sworn affidavits, Mr. Beck and Mr. Franchois both denied that the conversations were taped. Beck, ¶ 5, 9. We note, however, that neither affiant denied the taking of notes during the telephone conversations. The prosecution disputes defendant's assertion that the telephone conversations went beyond the

factual circumstances surrounding Mr. Wilkinson's son's evacuation. Beck, ¶ 7, 8; Franchois, ¶ 4, 5. Last, and most important, the prosecution contends that the conversations were in direct response to information supplied by the defense about Mr. Wilkinson. Beck, ¶ 10.

More particularly, the prosecution contends that the first conversation of July 7, 1989 was in response to assertions by Jonathan Zucker, Esq. (then defense counsel for Mr. Latham) during informal preindictment discussions with the prosecuting Assistant United States Attorney that there had been similar evacuations of dependents by others in El Salvador, including Wilkinson. Beck, ¶ 3. The second conversation was also apparently in response to defendant's filed affidavit of May 24, 1990, in which he asserted he had discussed Wilkinson's

evacuation with Wilkinson and that Latham relied upon it in evacuating his son.[3] Beck, ¶ 10.

ANALYSIS

A. Suppression of Exculpatory Brady Material

1. Nuts and Bolts of Brady v. Maryland

The defense argues that the failure of the Government to disclose evidence of two conversations between a deputy legal counsel for the A.I.D. Inspector General,

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3. The prosecutor also noted that on January 14, 1991, Cynthia Wood, Trial Attorney, U.S. Department of Justice, Public Integrity Section, Washington, D.C., sent Harry Wilkinson a "target" letter relating to his submission of false claims in connection with the voluntary evacuation of his son from El Salvador in 1985. Wilkinson's statemnet appears to be dated January 29, 1991, indicating that when Wilkinson made out his affidavit, he had only recently been notified that he was the target of a criminal investigation for presenting false claims.

Laurence Beck, Esq., and Harry Wilkinson, an A.I.D. employee, resulted in the suppression of exculpatory Brady material. We disagree.

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that a defendant's due process right to a fair trial is violated when the prosecution withholds evidence that is both favorable to the accused and material either to guilt or to punishment. Id. at 87; Carter v. Rafferty, 826 F.2d 1299, 1304 (3d Cir. 1987).

Brady thus requires disclosure by the government of evidence that is both exculpatory and material. Brady, 373 U.S. at 83; United States v. Starusko, 729 F.2d 256, 260 (3d Cir. 1984). Exculpatory evidence includes material that goes to the heart of the defendant's guilt or innocence, as well as impeach-

ment evidence which might alter the jury's judgment of the credibility of a crucial prosecution witness. Starusko, 729 F.2d at 260 citing Giglio v. United States, 405 U.S. 150, 154 (1972); Carter, 826 F.2d at 1305 citing Giglio, 405 U.S. at 154 (citations omitted).

The Supreme Court's decision in United States v. Agurs, 427 U.S. 97, 110 (1976), addressed the often perplexing problem of what information is "material" to the adversarial process in a specific criminal case. In analyzing the prior cases litigated before it concerning the prosecution's disclosure duty, the Court extracted three discrete factual situations in which suppressed evidence might be analyzed for its materiality. The first involves the situation in which a prosecution witness has given perjurious testimony and the prosecution knew or

should have known of the falsity of the statements.

The second situation, typified by the Brady case, arises when the defendant has made a specific request for information and the prosecution has failed to respond by revealing the requested information to the defendant. In such cases, the Agurs court noted, "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." Agurs, 427 U.S. at 106. In determining the materiality of evidence subject to a specific request, a reviewing court must determine whether "the suppressed evidence might have affected the outcome of the trial." Id. at 104; U.S. ex rel. Marzeno v. Gengler, 574 F.2d 730, 736 (3d Cir. 1978).

Third, when no request is made by the defendant or only a general request is made, information not revealed by the prosecutor will be held to be material only if "the omitted evidence creates a reasonable doubt that did not otherwise exist." United States v. Agurs, 427 U.S. 97, 112 (1976); Marzeno, 574 F.2d at 736 quoting Agurs, 427 U.S. at 112; Starusko, 729 F.2d at 260, n. 5 citing Agurs, 427 U.S. at 112. The Third Circuit has explainedd [sic], "The purpose of the Brady rule is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." Carter, 826 F.2d at 1304. Brady "is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." Starusko, 729 F.2d at 262 citing United

States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978). To constitute a Brady violation, therefore, the nondisclosure must do more than impede the defendant's ability to prepare for trial; it must adversely affect the court's ability to reach a just conclusion, to the prejudice of the defendant. Starusko, 729 F.2d at 262 citing United States v. Campagnuolo, 592 F.2d 852, 861-62 (5th Cir. 1979). "No denial of due process occurs if Brady material is disclosed in time for its effective use at trial." Starusko, 729 F.2d at 262. Moreover, "The government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." Id. In short, there is no duty of disclosure of evidence or witnesses known or accessible to the defense. United States v.

Wander, 601 F.2d 1251 (3d Cir. 1979); Marzeno v. Gengler, 574 F.2d 730, 735 (3d Cir. 1978); Campagnuolo, 592 F.2d at 861; United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977); United States v. Craig, 573 F.2d 455, 496 (7th Cir. 1977); United States v. Di Giovanni, 544 F.2d 642, 645 (2d Cir. 1976).

2. Application of Brady

Defendant contends that he made a "specific request" for Brady materials. Where, as here, the defendant merely asked the government to supply him with all exculpatory evidence in its possession, we could interpret his request to be general and apply the standard accordingly. We note, however, that the parties have experienced a great deal of confusion over the court's prior

discovery orders in this case.[4] Therefore, we have considered the Wilkinson evidence under the more strict, "specific request" standard, i.e., the standard most favorable to the defendant. We nonetheless find that under either standard, the undisclosed evidence would not have affected the outcome of the trial, nor would it have been material to

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4. We note that defendant's Discovery Request dated February 9, 1990, simply requested Brady material. However, the court discussed the prosecutor's obligation to disclose evidence in several Discovery Opinions, namely the Letter Opinions of May 17, 1990, June 22, 1990, and August 10, 1990. In this court's June 22, 1990 Letter Opinion, we directed the prosecution to disclose "documents relating to audits or investigations of the defendant conduct[ed] by the Investigator General's Office since 1987." In our August 10, 1990 Letter Opinion, we clarified our June 22, 1990 opinion to mean that "Any and all documents pertaining to the original audit of the defendant which uncovered his alleged impropriety should be disclosed." Letter Opinion, August 10, 1990, p. 12-13. Defendant's Exhibits B, D, E and F.

the jury's finding of defendant's guilt.

a. Materiality of the Wilkinson Evidence

Defendant's theory is that he could have used the conversation with Wilkinson, and any evidence memorializing same, to effectively cross examine government's witness David Passage, Deputy Chief of Mission in San Salvador and currently United States Ambassador to Botswana. Possibly implicit in defendant's theory is that if he had known of Wilkinson's statements, he also could have used this information to impeach Mr. Passage's credibility at trial and thus undermine an essential basis for the jury verdict. Defendant further contends that Wilkinson's testimony could have provided a useful starting place to investigate the origins and purpose of the voluntary evacuation

program. Although access to the Wilkinson materials may have been of some marginal use to the defendant, we find that the prosecutor's nondisclosure of same does not constitute a violation of Brady for two reasons. First, the evidence was cumulative, and probably would not have altered the outcome of the trial. Second, the government is under no duty to disclose evidence that defendant could have discovered with reasonable diligence.

The evidence upon which the defendant predicates this motion is cumulative evidence that would not have altered the outcome of the trial. For example, the Wilkinson affidavit indicates that Mr. Wilkinson was questioned about "how the voluntary evacuation program developed and how the program was managed at the post." Wilkinson

Affidavit, ¶ 4. The Wilkinson affidavit also discusses the establishment of "danger pay" to help recruitment, that the voluntary evacuation plan in El Salvador was to be "different" than the danger and evacuation plans in other countries, and that "the only requirement was to have the dependent in-country before sending him out." Wilkinson Affidavit ¶ 5 - 8. Defendant and other defense witnesses, however, provided substantial testimony in these areas on direct. Transcript, November 20, 1990, p. 72, 85, 102; November 21, 1990, p. 65, 109; November 26, 1990, p. 30, 55, 116. Therefore, the Wilkinson material adds little, if anything to the evidence, and is of limited materiality. In short, the Wilkinson evidence would not have altered the outcome of the trial, and thus, no Brady violation occurred.

Defendant also contends that Mr. Wilkinson was privy to the formulation of the evacuation policy, thereby making nondisclosure of the Wilkinson materials extremely prejudicial. Defendant's Brief, at 7. For example, in his affidavit Wilkinson discusses his participation in the development of the voluntary evacuation plan at a "meeting in the State Department, which included AID, USIS, Defense and State officials . . . ." Wilkinson Affidavit ¶ 6. Further, defendant notes that Mr. Wilkinson explained to Mr. Beck "that there were few written regulations on the policy, only a cursory description of the program." Wilkinson Affidavit, ¶ 8. Defendant states in a conclusionary fashion that not only was he

> unable to put on evidence relating to Mr. Wilkinson, [but] the defendant was deprived of the opportunity to investigate the

> information revealed by the affidavit and the conversations between Mr. Wilkinson and Mr. Beck. For example, **the defense was given no opportunity to investigate and call personnel from AID, USIS, the Defense Department and the Department of State, to inquire about their involvement in developing the voluntary evacuation plan. Thus, the defense was foreclosed from an entire avenue of investigation.**

Defendant's Brief, at 9 (emphasis added).

We find that defendant exaggerates his situation and ultimately misses the point. First, defense was not precluded from "putt[ing] on evidence relating to Mr. Wilkinson." In fact, just the opposite -- the **defendant** himself informed the prosecution that Wilkinson may have valuable exculpatory information. Defendant's Affidavit, May 24, 1990. Second, the defendant was only too aware of the background of the voluntary evacuation program, and in fact, provided testimony on that subject. Transcript,

November 26, 1990, p. 116; November 21, 1990, p. 109. Finally, and most important, the Wilkinson material relating to the development of the plan in Washington, D.C. carried no possibility that it might alter the outcome of the trial nor create a reasonable doubt since there was already extensive testimony as to the background of the policy -- including the "liberal" nature of the policy.[5] Transcript, November 20, 1990, p. 102; November 21, 1990, p. 65, 109; November 26, 1990, p. 30, 55, 116. Accordingly, because the Wilkinson evidence was merely cumulative and of limited materiality, we find that the prosecution did not violate

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5. We also question the inherent value and usefulness of information regarding the meeting in Washington, D.C. since it was remote in time and place to the events in El Salvador which helped to shape defendant's mental state in this case.

Brady.

b. The Wilkinson Information was "Known or Accessible" to the Defendant

Upon reviewing the record, we also find that the evidence concerning the Wilkinson conversation was readily available to the defendant, and therefore, the government was not under a duty to disclose it. United States v. Wander, 601 F.2d 1251 (3d Cir. 1979); United States v. Marzeno, 574 F.2d 730, 735 (3d Cir. 1978). In fact, it was the defendant himself who testified that Wilkinson had told him that the evacuation program was a post benefit designed to help with recruiting and that it was a liberally interpreted regulation open to all employees at post. More specifically, defendant testified at trial:

Q. Did you see any precedents, that is, documents of prior evacuations?

A. Yes, And in my discussion with Amar Kainth I was also told of the Jim Leo case, I was told his daughter Theresa; I was told about Walter Notheis's case; and I had also about this same time or just a little before I had discussed it with another party that had used this, his name is Harry Wilkinson.

Q. And what were you told about these cases?

A. Well, Harry had told me because he was in Washington and I guess at the very beginning when voluntary evacuation was being developed for the post, that people -- that AID was having a rough time getting people into El Salvador and that this was to be a benefit that would be given to post that would help with recruitment. And Wilkinson said that this was to be a very liberally interpreted regulation. It was open, it was open to all employees of the post.

Transcript, November 26, 1990, p. 116. Defendant testified that Wilkinson was in Washington when voluntary evacuation was being developed for the post. Defendant further testified that Wilkinson said that the Regulations were to be "very

liberally interpreted." In fact, in his Brief, defendant's counsel states:

> What the testimony says is that Mr. Latham knew that Mr. Wilkinson was in Washington when the voluntary evacuation plan was being developed, that AID was having a difficult time getting people to serve in El Salvador, that the voluntary evacuation plan benefit would aid recruitment, and that the voluntary evacuation plan was to be liberally interpreted.

Defendant's Response Brief, at 2.

One can infer from defendant's testimony that Wilkinson had some sort of direct knowledge of the events surrounding the development of the evacuation program. More important, however, the content of this conversation, coupled with the respective interests of the parties -- including defendant's substantial incentive to ascertain the basis of Wilkinson's opinions -- leaves us no choice but to find that with "reasonable diligence,"

defendant could have discovered more evidence about the Washington, D.C. meeting that Wilkinson allegedly attended.[6]

Accordingly, because the introduction of the Wilkinson material would not have altered the outcome of the trial, and because defendant was essentially aware of (and actually testified about) the proffered evidence, defendant is not entitled to a new trial.

B. Disclosure of Evidence and This Court's Pre-Trial Discovery Order

The defense contends that the suppressed material reflects on the

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6. In fact, the defense must have had some knowledge regarding the development of the voluntary evacuation plan in Washington, D.C., since defendant and at least one other defense witness testifed that the plan was developed at a meeting in Washington. Transcript, November 21, 1990, p. 109; November 26, 1990, p. 116.

A.I.D. Inspector General's Office ["IG's Office"] selective motivation in seeking prosecution of Latham. More specifically, the defense asserts that the failure to disclose the Wilkinson conversations violated the court's pretrial discovery orders. We disagree.

Although criminal prosecutions are presumed to have been started in good faith, discriminatory selective prosecution has been found to violate principles of equal protection.[7] Wayte v. United States, 470 U.S. 598, 608 (1985); United States v. Torquato, 602 F.2d 564, 568-69 (3d Cir. 1979) cert. denied, 444 U.S. 941 (1980). In order to establish the defense of **selective** prosecution, the

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7. Equal protection is embodied in the fifth amendment, and therefore, federal prosecutors are constained by equal protection principles. See Bolling v. Sharpe, 347 U.S. 497 (1954).

defendant must make a prima facie showing that 1) others similarly situated have not been prosecuted for the same offense, and 2) the decision to prosecute was "invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to exercise his constitutional rights." United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986) quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). The defense is available when an individual is intentionally discriminated against, even though the discrimination is not class-based. Torquato, 602 F.2d at 569, n. 9.[8]

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8. In order to make out a claim for **vindictive** prosecution, the defendant must show that the government is penalizing him for invoking legally protected rights. United States v. Schoolcraft, 879 F.2d 64, 67 (3d Cir. 1989) (citations omitted).

In an opinion filed on or about August 10, 1990, this court outlined in great detail the parameters of its previous discovery order filed June 22, 1990. We stated:

> Our June 22 discovery order means the following. Any and all documents pertaining to the original audit of the defendant which uncovered his alleged impropriety should be disclosed. We understand from the parties that the Government has already turned over these audit materials. Documents pertaining to the investigation of this matter in possession of the Office of Investigations need not be disclosed . . . . Documents solely in the possession of the Office of Legal Counsel will be required to be disclosed . . . .
>
> We are mindful that discovery on selective prosecution may easily get out of hand if the defendant tries to discover the entire prosecution file by bootstrapping such a request on a limited showing of entitlement to the defense. In this regard, **the guiding principle here is that the defendant should be allowed to see documents which may reasonably prove one of the elements of the selective prosecution defense**, as it is framed by the circumstances of the case. This defendant's claim of selective prosecution has to do with personal

> animus and how it may have affected the investigation and the decision to prosecute. Therefore, our discovery order is intended to track the trail of animus which is supported by the record evidence.

Letter Opinion, August 10, 1990 at 12-13 (emphasis added) (citations omitted).

Even assuming that Wilkinson's affidavit recounts his conversation with complete accuracy (which is contested by the Beck affidavit), we find that his statement is hardly a basis for alleging the suppression of material information regarding the elements of selective prosecution. In short, defendant has not demonstrated that Wilkinson's statement "could reasonably prove one of the elements of the selective prosecution defense." Basically, Wilkinson's affidavit indicates that Mr. Beck repeatedly assured him that he was not the target of a criminal investigation. In particular,

in the first conversation Wilkinson was advised that the "IG Office was looking into the Voluntary Evacuation Program as part of a criminal investigation . . . [and] that they were not investigating me." Wilkinson Affidavit, ¶ 1. This statement is merely a statement of fact that provides no insight into the selective or vindictive prosecution defense. Further, it appears that by the time of this conversation, the matter had been referred for prosecution to the United States Attorney's Office over four months prior, and there had been at least one meeting between the prosecutor and the defendant's counsel wherein defense counsel discussed the similarity of Wilkinson's case.

The second conversation with Wilkinson was post-indictment and in response to an affidavit filed by the

defense. Thus, the statement by Wilkinson that the focus was on Latham obviously would be another simple statement of fact which does not reflect on the issue of improper motive.

A selective prosecution defense requires, among other things, allegations and proof that others similarly situated have not been prosecuted for the same offense, and that the decision to prosecute was "invidious or in bad faith." Defendant fails to show us how Wilkinson's statements could reasonably prove one of the elements of the selective prosecution defense.[9] Accordingly,

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9. We also note here that three additional cases for false claims relating to voluntary evacuation have been refereed by the A.I.D. Inspector General's Office to the U.S. Department of Justice for prosecution, including Harry Wilkinson's case. Beck Affidavit, ¶ 13; Prosecution's Exhibit C, Target Letter from Cynthia Wood to Harry Wilkinson, January 14, 1991.

we find that the government did not violate the court's pre trial discovery orders.

C. Prosecutorial Conduct

Defendant also argues that failure to disclose the Wilkinson statements constitutes prosecutorial misconduct. We disagree.

Defendant asserts that the prosecution failed to disclose "specifically requested exculpatory evidence."[10] See U.S. v. Buzzi, 588 F. Supp. 1395, 1397 (S.D.N.Y. 1984) (court should grant a new trial if there is any reasonable likelihood that the evidence could have affected the outcome of the trial).

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10. Of course, this court acknowledges the prosecutor's responsibility to be aware of everything in his files -- regardless of whether it has been overlooked. Landano, at 645.

Defendant is unable to demonstrate, however, that the suppressed evidence was specifically requested; therefore, the pertinent inquiry for granting a new trial is whether the unrequested evidence would create a reasonable doubt of guilt that did not otherwise exist. Smith v. Phillips, 102 S. Ct. 940, 947 (1982); U.S. v. Buzzi, 588 F. Supp. at 1397 citing United States v. Alessi, 638 F.2d 466 (2d Cir. 1980). In any event, and under either standard, we find that defendant's conviction should stand.[11]

Even assuming that the statements contained in Wilkinson's affidavit (recounting his conversation with Mr. Beck) are completely accurate, we believe that at best the evidence would have been

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11. The court undertakes a similar analysis in much greater detail in the Brady section above.

cumulative, and probably would not have altered the outcome at trial. Further, we also find that any evidence **possibly** obtained as a result of Wilkinson's conversations with Mr. Beck, e.g., the genesis of the voluntary evacuation policy in Washington D.C., would not have altered the outcome of the trial, nor led to an acquittal.

D. Newly Discovered Evidence

The defense asserts that the information contained in Wilkinson's statement warrants a new trial since it is newly discovered evidence. We disagree.

> [T]he trial court has broad powers to grant a new trial if for any reason it concludes that the trial has resulted in a miscarriage of justice. It is said that [motions for a new trial based on newly discovered evidence] are not favored, and that new trial are to be granted with caution.

C. Wright, Federal Practice and Procedure: Criminal 2d, § 551, at 236-37 (1982) (citations and footnotes omitted).

The Third Circuit has developed a standard for granting a new trial based on the discovery of new evidence. United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973). The court must consider five factors:

1. The evidence must have been discovered after the trial;

2. The failure to learn of the evidence must not have been caused by defendant's lack of diligence;

3. The new evidence must not be merely cumulative or impeaching;

4. It must be material to the principal issues involved; and

5. It must be of such a nature that in a new trial it would probably produce an acquittal.

Id. at 116.[12]

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12. "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional

Although defendant may satisfy the first factor in that the Wilkinson affidavit was discovered after trial, we have resolved the following four factors to militate against the granting of a new trial.

We note that defendant does not fully satisfy the second factor in that with reasonable diligence he should have been able to learn of Wilkinson's statements. First, defendant testified on direct, and otherwise demonstrated an awareness that Wilkinson had valuable information about the operation of the program. Transcript, November 26, 1990, p. 116. Second, defendant was the one who told the prosecution about Wilkinson

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evidence of minor importance might be sufficient . . . ." Carter, 826 F.2d at 1308 quoting [sic] 427 U.S. 97 (1976).

in the first place. Defendant's Affidavit, May 24, 1990.

Further, the evidence in the Wilkinson affidavit does not appear to satisfy the third and fourth factors in that the Wilkinson material is mainly cumulative of the evidence introduced at trial regarding the voluntary evacuation procedure and the selective prosecution defense. While the cumulativeness of this evidence alone would not necessarily suffice to demonstrate its immateriality, its cumulativeness makes it unlikely that its introduction could have affected the outcome of the trial. The cumulativeness of this material, moreover, precludes any possibility that the material warrants a new trial as "newly discovered evidence." United States v. Alessi, 638 F.2d at 479. Finally, mainly due to the evidence's cumulativeness and limited materiality,

we do not find that its introduction would lead to an acquittal.

MOTION FOR A JUDGMENT OF ACQUITTAL OR NEW TRIAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVICT, AND FOR SEVERAL LEGAL ERRORS AT TRIAL

Defendant's motions for a judgment of acquittal under Rule 29, or a new trial, under Rule 33, are presently before this court. Fed. R. Crim. P. 29; Fed. R. Crim. P. 33. Defendant makes several arguments in support of his application. First, defendant argues that this court should render a judgment of acquittal because there was insufficient evidence to convict. Specifically, defendant argues that the prosecution was unable to prove that: the documents identified in the indictment were "claims" under § 287; defendant's request for "special allowances" were "false"; or

that defendant had the requisite criminal intent in that **he knew** that the submitted claims were "false." Second, defendant argues that this court should, in the alternative, grant a new trial because of the court's failure to give several points for charge, the prosecution's improper closing, and the prosecution's improper calling of a rebuttal witness. For the reasons that follow, we deny defendant's motion in part, and grant his motion in part.

ANALYSIS

A. Defendant's Motion That There was Insufficient Evidence to Convict

Defendant contends that the evidence presented at trial was insufficient to prove at least three of the four elements of the charges contained in the indictment: 1) that the documents submitted by

defendant were "claims" under § 287; 2) that defendant's requests for "special allowances" in connection with his son's evacuation from El Salvador were false; or 3) that he knew that they were false.

Federal Rule of Criminal Procedure 29 states that a court shall order a judgment of acquittal "if the evidence is insufficient to sustain a conviction . . . ." Fed. R. Civ. P. 29. Therefore, we will be considering "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Phifer, 400 F. Supp. 719, 724 (E.D. Pa. 1975) aff'd 532 F.2d 748 (3d Cir. 1976) quoting Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947). "It is not

for the court, ruling on a motion for a judgment of acquittal, to assess the credibility of witnesses, weigh the evidence, or draw inferences of fact from the evidence." Id. citing 2 C. Wright and A. Miller, Federal Practice and Procedure: Criminal, § 467, at 259. "Rather, the court must view the evidence in a light most favorable to the Government." United States v. Pratt, 429 F.2d 690 (3d Cir. 1970).

1. The Documents Identified in the Indictment Were "Claims" under § 287

Defendant argues that since the filing of the vouchers

> did not seek or have the natural tendency to cause the disbursement of money by the United States, but rather to extinguish part or all of a claim the United States had against Frank Latham for the return or proper use of advances, these were not "claims" against the United States within the meaning of 18 U.S.C. § 287. Defendant's Memorandum, p. 20-1.

We disagree.

Evidence showed that the defendant submitted a series of advances requesting payment for Stephen Latham's travel subsistence expenses before such expenses were incurred. GE 103, 105, 107, 109 and 111. Subsequent to the filing of each advance, and Latham's obtaining payment thereon, he submitted corresponding travel vouchers that specified and accounted for the direct added expenses of evacuation he incurred over a particular period of time. GE 104, 106, 108, 110, 112 and 113. The effect of these vouchers was to reduce defendant's liability to the United States in connection with funds obtained by the advances. Therefore, we agree with the prosecution that the jury was entitled to find that the vouchers were requests for money

which A.I.D. was expected to pay, and therefore represented "claims." United States v. Jackson, 845 F.2d 880 (9th Cir. 1988); United States v. Duncan, 816 F.2d 153 (4th Cir. 1987).

2. Falsity of Defendant's Claims

Defendant argues that the claims he submitted were not false since Chapter 600, Section 130 et seq. of the Standardized Regulations authorize the submission of the claims for Stephen Latham's departure. Essentially, defendant argues that once his son was authorized to evacuate from El Salvador, any expenses temporarily occurring thereafter were payable as direct added expenses to the extent permitted under the formula of Section 131. We disagree.

The standard by which to challenge a jury verdict under Rule 29 is whether a

reasonable jury could have found the defendant guilty beyond a reasonable doubt, with all of the evidence reviewed in the "light most favorable to the government." United States v. Pratt, 429 F.2d 690 (3d Cir. 1970); United States v. Phifer, 400 F. Supp. 719, 725 (E.D. Pa. 1975). With this standard in mind, we turn to the evidence presented to the jury.

The evidence at trial demonstrated that defendant brought his son to El Salvador over Thanksgiving holiday from college with the express purpose of sending him back to the United States in order to claim evacuation payments. Transcript, November 21, 1990, pp. 119-20. Chapter 600, Section 610 of the Regulations makes evident, however, that the purpose of payments for evacuation/authorized departure is to provide

an orderly and equitable procedure for payment of ". . . allowances in the event of an emergency evacuation or authorized departure of employees . . . from duty stations for military or other reasons of national interest or because of imminent danger to their lives." The substance of this statement of general purpose is essentially reiterated in Chapter 600, Sections 101 and 105(e). These sections, in the aggregate, provide the framework for assessment of the provisions of Section 130 et seq. which relate specifically to evacuation. We agree with the prosecution that

> the purpose of an evacuation or authorized departure is to provide a means for an orderly and equitable procedure to permit employees and/or their dependents to leave dangerous overseas environments. Fundamental to the regulatory structure as expressed in these sections, then, is the intent to provide financial assistance to employees and their dependents in defraying the very real costs associated with displace-

> ment from their otherwise anticipated circumstances. Prosecution's Brief, at 17-18.

Nothing in these sections implies that the evacuation procedures are designed simply as an income producing benefit to those authorized to depart. To the contrary, the assumption of the regulatory structure is the existence of real expenses incurred as a result of dislocation.

With this framework in mind, we turn to the provisions of Chapter 600, Section 130. Evacuation entitles an employee to "special allowances," which are designed to "offset any direct added expenses which are incurred as a result of . . . evacuation." SR 600 (130). As this court stated in a recent opinion, SR 160 (131) "clearly indicates that subsistence expenses [as defined] are compensable

'direct added expenses.'" Letter Opinion, August 10, 1990, at 7-8, n.4.

The compensable allowances under SR 600 are in two parts: "travel expense allowances," described in SR 600(131.a), and "subsistence expense allowances," described in SR 600(131.b), only one of which can be paid for a given day. Where only one family member is evacuated to the United States at a commercial rate, as here, the payment is nonaccountable for 40% of the per diem but given only on an accountable basis for lodging expenses up to the balance. SR 600 (131.b.(1)b.(2)); GE 102.

Section 130, however, provides that "the employees continue to be responsible for normal family living expenses." By the plain meaning of the Regulations, therefore, we find that Section 130 renders non-compensable post-evacuation

costs that are anticipated normal expenses not associated with the dislocation. In short, Section 130 requires the actual incurring of additional expenses resulting from evacuation.

Section 131 provides formulae for determining the extent to which direct added expenses may be compensable. Section 131 states that "in determining the direct added expenses which may be payable . . . the following shall be considered." Accordingly, Section 131 limits compensability to circumstances where there are direct added expenses, and provides a formula for determining compensability. In fact, Section 131(b)(3) provides that the formula of 131(b)(1) not be used if less money would more appropriately reimburse "the employee's necessary living expenses."

In addition to the discussion above regarding interpretation of the Regulations, we also note that defendant had no additional subsistence expenses for his son resulting from evacuation since his son's circumstances were unchanged by the evacuation. As demonstrated during trial, Stephen returned to his apartment in Philadelphia, Pennsylvania to resume his studies in accordance with his plans decided before the evacuation. Although these expenses for Stephan [sic] technically occurred after evacuation, these expenses did not result from the evacuation. Transcript, November 21, 1990, p. 129-39; GE 402, 403. Likewise, the specific prohibition on compensability of "normal family living expenses" in Section 130 expressly barred Latham's claims, since the costs he submitted for payment were pre-existing at the time of

evacuation and did not result from dislocation or changed circumstances.

In sum, this court finds that the jury had sufficient evidence before it to find that the claims submitted by defendant were false.

3. Defendant's Criminal Intent and Knowledge

Defendant argues that "[i]t cannot be a crime for a government employee to claim every employment benefit to which he believes himself entitled under the government's rules and regulations, . . ." Defendant's Memorandum, at 15. Specifically, defendant notes that every government witness with authority in this area agreed that administrative practice from 1985 through mid-1988 was to give the voluntary evacuation regulations the "broadest interpretation." Defendant further states that the evidence did not

demonstrate that defendant knew that the claimed per diems did not qualify as "direct added expenses." We disagree.

Evidence of the defendant's criminal intent and knowledge that the claims were false was adduced through many exhibits and through the testimony of several witnesses. First, defendant admitted that he was familiar with, and had researched the authorizing regulations relating to evacuation. Transcript, November 26, 1990 at 116-19. In fact, in his own Memorandum dated August 10, 1987 -- merely three months before the evacuation of Stephen -- defendant admitted that voluntary evacuation for his daughter, Valerie, would not be available. GE 301.

Second, defendant's knowledge and criminal intent is further supported by forms submitted by defendant relating to

the voluntary evacuation of Stephen. On July 24, 1987, defendant submitted a Form 1190 reporting that Stephen's "place of residence" was Philadelphia, Pennsylvania, and that he had departed from post in May, 1987. GE 205. On November 23, 1987, just two days before Stephen's travel to El Salvador on a round-trip ticket in mid-semester at Philadelphia College of Art, defendant submitted another Form 1190, this time changing Stephen's reported "place of residence" to El Salvador. GE 206. Nothing had changed for Stephen Latham, however, and in fact, filing the Form 1190 changing Stephen's residence demonstrated defendant's intent to bring his son to El Salvador simply to evacuate him. We also note that GE 206 contained an attempt by Latham to obtain reimbursement of Valerie's expenses at a higher away-from-

post allowance rate. Transcript of November 21, 1990, pp. 17-18. GE 206, however, indicates approval only of the lower rate under date of November 25, 1987. The next day, November 26, 1987, Latham decided to recover the shortfall by submitting a travel authorization request for Stephen's evacuation. GE 101.

Additional evidence from the post-evacuation period also demonstrates that defendant had the requisite criminal intent and knowledge. For example, a June 6, 1988 Memorandum from Esther Klein, the El Salvador Embassy Personnel Officer, to Gerald Nell, A.I.D. Executive Officer in El Salvador, stated: "It appears that Stephen Latham came here for Thanksgiving break from School. I do not believe that voluntary evacuation can be authorized for dependents who do not

reside at post with the employee. . . ." GE 207. The memo was sent to defendant. GE 207. Further, Mr. Nell testified that sometime in August or September, 1988, defendant called and asked him for another copy of that memo, since he had lost the first copy. Transcript, November 20, 1990, p. 108. We note that claims for expenses were submitted by defendant under dates of August 4, 1988 and August 15, 1988. In short, having been put on notice that his claims may be improper, defendant continued to submit claims.

Another memo was sent about Harry Wilkinson's evacuation of a dependent, dated July 13, 1988, which similarly questioned the propriety of this type of activity. GE 600. We note here that defendant has testified that he particularly relied upon Wilkinson's evacuation

as a precedent for defendant's own activities. Transcript, November 27, 1990, pp. 88-90.

Defendant received a third notice questioning the propriety of the use of the evacuation procedures when the evacuation of A.I.D. employee Skowronski was denied on grounds that there was nothing life-threatening to prompt departure of his dependents. DE 4. The defendant admitted receiving this memo during October, 1988, but still did nothing about his own situation. Transcript, November 27, 1990, p. 99, 101.

Based on the foregoing, we find that there was enough evidence presented from which the jury could find beyond a reasonable doubt that defendant knowingly submitted false claims.

B. Defendant's Motion That There Were Errors at Trial Justifying a New Trial

Defendant asserts that the trial court committed several errors at trial, and therefore that a new trial should be granted under Federal Rule of Criminal Procedure 33. Fed. R. Crim. P. 33. Federal Rule 33 states that a court "may grant a new trial to [a] defendant if required in the interest of justice." Fed. R. Crim. P. 33. More specifically, if the court concludes that the verdict is contrary to the evidence, or its weight, and that a miscarriage of justice may have resulted, the judgment may be set aside and new trial granted. United States v. Phifer, 400 F. Supp. 719, 722 (E.D. Pa. 1975) aff'd 532 F.2d 748 (3d Cir. 1976).

> It is said that these motions are not favored, and that new trials are to be granted with caution. There is substantial authority supporting this proposition if the new trial is sought on the ground of newly discovered evidence, but it seems a

> mistake to extend this proposition to motions for a new trial because of trial errors or other similar grounds. **Here the motion [for a new trial] should be neither favored nor disfavored, and the question is only what in the interest of justice requires.**

C. Wright, Federal Practice and Procedure: Criminal 2d, § 551, at 236-37 (1972) (footnotes and citations omitted).

18 U.S.C.S. § 3731 was amended in 1984 to afford the government a right of appeal from an order of a district court "granting a new trial after verdict or judgment." The appropriate standard of review when the government appeals, pursuant to 18 U.S.C.S. § 3731, is one of abuse of discretion. United States v. McBride, 862 F.2d 1316 (8th Cir. 1988).

We now turn to defendant's arguments. First, defendant argues that the court's failure to give several of the defendant's points for charge erroneously

kept the defendant's theory from the jury. Second, defendant argues that the prosecutor's closing invited conviction on an improper basis not charged in the indictment. Third, defendant argues that the trial court should not have allowed the prosecution to present its rebuttal witness. We address defendant's contentions below.

1. Trial Court's Jury Charge

Defendant argues that this court committed plain error when it failed to charge the jury on the content and meaning of the Standardized Regulations. Defendant further argues that this court should have charged the jury on the defense's theory of the case.[13] On this

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13. Defendant asserts error because the court did not charge the jury with the defense theory of the case. We find defendant's assertion without merit, since this court is not permitted to invade the province of the jury by charging the jury as to the parties'

basis, defendant requests this court grant a new trial.

This court did not charge the jury on the content or the meaning[14] of the

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legal arguments, or by providing the jury with defendant's factual descriptions. See United States v. Bertucci, 333 F.2d 192 (3d Cir. 1964); United States v. Standefer, 452 F. Supp. 1178, 1187 (W.D. Pa. 1978).

14. During the closing minutes of the jury charge conference, defendant orally requested -- for the first time -- that this court charge the jury as to the meaning behind the "Direct Added Expenses" provision of the Standardized Regulations. Contrary to the requirements of Fed. R. Crim. P. 30, defense counsel did not file a written request for this charge before or during the charge conference. Shortly thereafter, and upon the court's direction, counsel submitted a written jury charge. Counsel's "supplemental" jury charge (as it related to the Standardized Regulations) is printed in full below:

> 4. Under the section of the Standardized Regulations entitled "Determining Direct Added Expenses," it is clear that the subsistence expenses are compensable under Standardized Regulation 600(130) as "direct added expenses."
>
> 5. Standardized Regulation 600 (131) outlines how "direct added expenses["] are determined and it

regulation at issue. In fact, this court did not even explicitly refer to the Standardized Regulations in its jury charge. Instead, this court charged the jury on 18 U.S.C. § 287, and provided the Standardized Regulations to the jury as a

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> clearly indicates that subsistence expenses are compensable direct added expenses.

Defendant's Supplemental Request to Charge, November 28, 1990.

Counsel's description of the Standardized Regulations, submitted to his court only minutes before we were to charge the jury, was woefully inadequate in that it incompletely and thus inaccurately described the law. For example, counsel submissions to this court leave the impression that all subsistence expenses are compensable direct added expenses, and that anyone's subsistence expense are payable.

Accordingly, the court denied admission of defendant's supplemental requested charge. United States v. Bertucci, 333 F.2d 292, 298 (3d Cir. 1964); United States v. Haldeman, 559 F.2d 31, 103, n. 196 (D.C. Cir. 1976) (citations omitted).

prosecution exhibit. GE 501. This court also charged the pertinent portions of the indictment (which referred to the Regulations).

Because the Standardized Regulations gave rise to the controlling law of the case, and because the terms used in the Regulations are not within the realm of common understanding, we find that the court's failure to instruct the jury as to the content and meaning of the Regulations is plain error. A new trial will be ordered on this basis.[15]

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15. Although defense counsel made a limited request that this court charge the **meaning** of "Direct Added Expenses," defense counsel did not request that we charge the **meaning of the Standardized Regulations as a whole.** Nor did defense counsel request that we charge the **content.** Thus, under Federal Rule of Criminal Procedure 52(b), any error complained of at this stage must be "plain error."

a. The Standardized Regulations Provided the Controlling Law and Thus the Jury Should Have Been Charged

Where the substantive law of the case is found in administrative regulations, it is plain error to fail to charge the jury on the content and meaning of those regulations. United States v. Pincourt, 159 F.2d 917, 918-20 (3d Cir. 1947).

In Pincourt, the Third Circuit addressed a situation similar to the one before us, wherein it reversed a conviction under the Price Control Act notwithstanding the lack of a proper objection. The Third Circuit held that the trial court must instruct the jury on the content of the applicable maximum price regulation:

> The relevant portion of that regulation . . . was the primary law of the case. **Instructions from the Court regarding [the regulations] were necessary in order for the jury**

> **to intelligently apply it as part of the controlling law to the facts and so reach a verdict based upon a proper understanding of the issues . . . . [The key] regulation . . . was not explained, read or mentioned by the District Judge in his charge.** Without the governing regulation being made plain to it, the jury could not have an informed judgment on the issue and the case did not go to it under the safeguards of correct procedure.

Pincourt, 159 F.2d at 918-19 (emphasis added) (citations omitted); see also, United States v. Max, 156 F.2d 13 (3d Cir. 1946) (reversed conviction where trial court did not describe offenses in its charge, but did give indictment to jury); United States v. Noble, 155 F.2d 315 (3d Cir. 1946) (reversed conviction where the trial court supplied the jury with the indictment, but did not instruct the jury on the Second War Powers Act or the related ration orders allegedly violated); United States v. Levy, 153 F.2d 995 (3d Cir. 1946) (reversed convic-

tion where "[n]either the provisions of the Price Control Act, the regulations under it, nor the substance of either, ever reached the jury").

Thus, Pincourt and the other cases cited above stand for the proposition that where regulations constitute the controlling law of the case, the trial court must make the regulations "plain" to the jury **in its charge.**[16] Turning to the case currently before us, we find that the claims at issue in Mr. Latham's case could only have been false if he sought payment of "direct added expenses" not authorized by SR 600(130). Thus, the administrative regulations gave rise to the substance of the criminal charge

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16. For example, depending on the complexity of the regulations, the trial court could either explain or simply read the regulations to the jury. This issue is discussed in more detail in the following section.

under 18 U.S.C. § 287, and we committed plain error in not charging the jury accordingly.[17] Pincourt, 159 F.2d at

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17. In its Brief, the prosecution argues that Pincourt, Levy, and Gordon support its position. In particular, the prosecution relies upon the Gordon court's interpretation of previous Third Circuit rulings in this area. United States v. Gordon, 242 F.2d 122, 127 (3d Cir. 1957). We have reviewed these cases carefully, and find that the prosecution's reliance upon these cases, includiing Gordon, is misplaced.

In Gordon, the Third Circuit addressed whether a trial court's jury charge for conspiracy failed to define the underlying substantive offense of income tax evasion. The Third Circuit held that the jury instruction which charged the conspiracy and **described** the underlying offense of income tax evasion was adequate since it used "proper statutory language" and because the "statute [was] quite simple." Gordon, 242 F.2d 122, 126-27 (3d Cir. 1957). In affirming the conviction, the Gordon court distinguished Pincourt and other recent cases where the Third Circuit reversed the underlying convictions because of inadequate jury instructions. The Gordon court stated that those cases "were correctly decided," but were distinguishable because "the primary law **involved was neither read nor explained to the jury.**" Gordon, 242 F.2d at 127 citing United States v. Pincourt, 150 F.2d 917 (3d Cir. 1947), United States v. Max, 156 F.2d 13 (3d Cir. 1946), United States v. Noble, 155 F.2d 315 (3d Cir.

918-919.

b. Whether the Trial Court Must Charge the Content and Meaning of the Standardized Regulations

As noted above, this court provided the text of the Standardized Regulations to the jury in the form of a government exhibit, but it did not discuss the Regulations in its charge. Thus, the defendant has argued that the Regulations did not go to the jury under the correct procedure, **and** that the court should have charged the meaning of the Regulations.

In response, the prosecution argues that "it was [not] error not to instruct the jury on the Regulations, [since] (i)

1946), and United States v. Levy, 153 F.2d 995 (3d Cir. 1946) (emphasis added). Thus, we believe that United States v. Gordon actually cuts against athe prosecution, since the law of our case -- the Standardized Regulations -- was neither read nor explained to the jury, either.

the pertinent Regulations were provided to the jury for their review (GE 501), . . .". We must disagree. By submitting the Regulations to the jury in the form of a government exhibit, the jury was free to treat the Regulations as it would a piece of evidence -- free to disregard or construe the Regulations as it saw fit. Second, by charging (at great length) 18 U.S.C.S. 287, the trial court was improperly sending an implicit message to the jury that the only law applicable was contained in the jury charge. Because the court did not correctly apprise the jury of the law, the jury could have applied the law improperly. Thus, the case did not go to it under the safeguards of correct procedure.

Next, the prosecution argues that it is proper for a court not to give legal

instructions on the **meaning** of terms when the terms are not outside the realm of common understanding nor so technical as to require specific definitions. We agree with that general proposition. United States v. Lignarolo, 770 F.2d 971 (11th Cir. 1985) (jury instruction regarding "distribution of proceeds of an illegal activity" was not erroneous due to court's failure to define the word "distribute" where the term was within the common understanding of a juror); United States v. McDonald, 576 F.2d 1350, 1356 (9th Cir. 1978) (no need for instruction on the meaning of the term "with recourse"); United States v. Pepe, 747 F.2d at 675, n. 78 (11th Cir. 1984) (trial court did not commit plain error in omitting an instruction covering "attempt"); United States v. Johnpoll, 739 F.2d 702, 712 (2d Cir. 1984) (jury

instruction regarding possession of recently stolen property was not erroneous due to court's failure to define the word "recently" where the term was not outside the common understanding nor technical or ambiguous); United States v. Crockett, 506 F.2d 759, 762 (5th Cir. 1975) (trial court was not required to define terms of predicate state law violation in federal prosecution for conducting illegal gambling business).[18]

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18. During oral argument, the Assistant United States Attorney, Jeremy Frey, urged this court to review the more "modern cases," discussed in his Brief, including United States v. Crockett, 506 F.2d 759, 761 (5th Cir. 1975). We find that Crockett is inapposite. In Crockett, the Third [sic] Circuit was addressing whether the trial court was required to **elaborate** on the state law elements of an offense charged under federal law. The Third [sic] Circuit found that it was not plain error for the trial court to charge that a "commercial gambling business" was a violation of state law (instead of charging the precise wording of the statute). The court explained that "commercial gambling" is a "phrase of common under-

But, we reject the prosecution's underlying premise that the terms in the Standardized Regulations are not outside the realm of common understanding nor so technical as to require specific definitions. We believe that the Standardized Regulations include such terms and structure so as to require guidance from the court, as a matter of law, on their content and meaning.[19] First, the Stan-

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standing," and that a trial court is not required to define terms which are reasonably within the common understanding of a juror. Crockett, 506 F.2d at 762 citing Bohn v. United States, 260 F.2d 773, 779 (8th Cir. 1958) (other citations omitted).

Obviously, the situation in Crockett is distinguishable from the case before this court in that we did not mention, refer to, nor charge, the jury with the Standardized Regulations.

19. In a previous opinion of this court (which rejected defendant's contention that the Standardized Regulations were so vague as to violate the **due process clause**), we found the regulations to be straightforward and not overly complicated. Letter Opinion, August 10, 1990, pp. 607.

We still find, however, that the jury may require some explanation as to

dardized Regulations are quite lengthy, and thus, somewhat complicated -- in fact, they comprise twelve (12) single-spaced pages. Second, defendant makes much of the ambiguity in the terms "subsistence expenses" and "direct added expense." In fact, the Regulations are comprised of many such terms of art. Thus, we agree that a short explanation of these terms (which were crucial to the case) would have been extremely helpful (if not necessary) to the jury determination. Third, the Standardized Regulations are structured so as to require extensive cross referencing between sections. A jury charge explaining the meaning and application of terms within the Standardized Regulations could there-

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the terms and structure of the Regulations.

fore limit any confusion that the jury may have in trying to cross reference within the Regulations. In sum, although the Standardized Regulations pass constitutional muster, we believe that they nonetheless require an explanation from the court such as the one advanced by defendant (and provided in a recent Letter Opinion):

> The indictment identifies the allegedly false claims as "claims for direct added expenses for subsistence associated with the departure of Stephen Latham from El Salvador." Indictment of G. Franklin Latham, Jan. 9, 1990, ¶ 10. Special allowances for these types of expenses are allowed under Standardized Regulation 600 (130), which states:
>
> > Special allowances specified in Section 131 and 133 are paid to employees evacuated or authorized departure to offset any direct added expenses which are incurred by the employees as a result of his/her evacuation and/or the evacuation of his/her dependents. The employees continue to be responsible for normal family living expenses.

U.S. Dept. of State, Standardized Reg. 600(130) (June 22, 1986). Standardized Regulation 600(131) goes on to state that expenses for subsistence following an evacuation or authorized departure are considered direct added expenses for which a Government employee may be reimbursed. Id., 600(131)(b). The special allowance discussed in Standardized Regulation 600(133), the allowance for educational expenses, is not involved in this case.

The language of Standardized Regulation 600(130) clearly states that a Government employees [sic] may be reimbursed for expenses incurred as a result of an evacuation or authorized departure. It states the type of allowances that can be obtained; namely, those specified in Standardized Regulations 600(131) and 600(133). It further states that reimbursement can be obtained for the departure of the employee himself or the departure of his dependents. Under the section entitled "Determining Direct Added Expenses," which is also one of the two sections referred to in Standardized Regulation 600(130), it is clear that the subsistence expenses are compensable under Standardized Regulation 600(130), as "direct added expenses." Id., 600 (131)(b). In the general provisions which precede Standardized Regulation 600(130), it clearly shows that an "evacuation" occurs when the Government orders its employees to leave and an "authorized departure" occurs

> when the Government approves or permits its employees to leave. Id., 600(101). The regulations also indicate that their purpose is to provide compensation for the departures of Government employees or their dependents "for military or other reasons which create imminent danger to the life of the employees or their dependents or otherwise are in the national interest." Id.

Letter Opinion, August 10, 1990, pp. 6-7.

Because the Standardized Regulations gave rise to the controlling law of the case, and because the terms used in the Standardized Regulations are not within the realm of common understanding, we find that this court's failure to instruct the jury as to the content and meaning of the Standardized Regulations is plain error, and warrants a new trial.

2. Prosecutor's Closing Argument

In his closing, the prosecutor argued that the evacuation was a "sham from the start designed to obtain

benefits for which [the defendant] was not eligible." Transcript, November 26, 1990, p. 69. Defendant argues that the prosecution's closing was improper in that the prosecution "cast aspersions on Stephen's voluntary evacuation despite the fact that the government never charged that the voluntary evacuation was improper or unlawful." Defendant argues that the prosecutor's closing argument invited conviction of defendant for his submission of his son's travel expenses, when the indictment only charged the submission of subsistence expenses as illegal. In short, defendant asserts that the closing invited conviction on a theory other than that expressed in the indictment.

Although this court is given broad discretion in determining the propriety of arguments by counsel, it is improper

to allow the prosecutor to argue contrary to the law or to suggest to the jury that they convict on a basis other than which underlay the charges. See United States v. Di Loreto, 888 F.2d 996 (3d Cir. 1989). This court tests defendant's contention by deciding whether any impropriety was so prejudicial that failure to give an appropriate instruction or declare a mistrial was an abuse of discretion. Herring v. New York, 422 U.S. 853, 862 (1975); United States v. Guess, 745 F.2d 1286 (9th Cir. 1984). Specifically, we consider whether the prosecutor's remarks were sufficiently prejudicial to violate defendant's due process rights. United States v. Scarfo, 685 F.2d 842, 849 (3d Cir. 1982).

We disagree with defendant's contention that the prosecutor's references to a "tarmac turnaround" invited conviction

for the submission of **travel expenses.** We note that during opening and closing, the prosecution explained to the jury that the indictment solely charged subsistence expenses. Transcript, November 19, 1990, pp. 10, 14; November 28, 1990, pp. 55, 107. It would defy reality, however, to say that the circumstances surrounding Stephen Latham's travel to and departure from El Salvador in November 1987 -- including the submission of travel expenses -- were irrelevant to the issues joined at trial and thus improper matters to discuss during closing. Transcript, November 21, 1990, p. 175-76.

Therefore, we find that the prosecutor's closing was not improper.

3. Prosecutor's Rebuttal Witness

Defendant contends that the rebuttal testimony of David Passage, United States Ambassador to Botswana (and who was previously the Charge D'Affairs [sic] in El Salvador), was improper. We disagree.

The function of rebuttal evidence is to explain or rebut evidence offered by the other party. United States v. Neary, 733 F.2d 210, 220 (2d Cir. 1984). In assessing the propriety of the admission of rebuttal testimony, the court is given wide discretion. United States v. Casamento, 887 F.2d 1141, 1172 (2d Cir. 1989). We believe that the court properly exercised its discretion in permitting Ambassador Passage's rebuttal to defendant's testimony. First, defendant offered substantial testimony as to his belief about the voluntary evacuation policy and its operation in El

Salvador before and during 1987. Transcript, November 26, 1990, pp. 26, 36-39; 52-70; 116-17. Second, defendant made reference during his testimony to a memo of Ambassador Passage from July 30, 1985 regarding evacuation, and he testified about another cable to El Salvador regarding evacuation from November, 1985. Transcript, November 27, 1990, pp. 79, 40-41; DE 17.

In rebuttal, Ambassador Passage testified about the policy in El Salvador during 1985 - 1986 when he was the person who established that policy, and how that policy was communicated. Accordingly, we believe that Ambassador Passage's testimony was properly admitted in that it was in direct response to issues raised by defendant.

CONCLUSION

In Mr. Latham's trial, the governing regulations were not made plain to the jury in this court's charge. Further, by submitting the Regulations to the jury in the form of a government exhibit, the jury may have believed itself free to treat the Regulations as it would a piece of evidence -- free to disregard or construe the Regulations as it saw fit. Thus, the jury may not have had an informed judgment on the issues, and the case did not go to it under the safeguards of correct procedure.

Although Mr. Latham may not be entitled to a perfect trial, he is entitled to a fair trial.

For the reasons stated above, defendant's motion for an acquittal is denied. Defendant's motion for a new

trial is granted. The accompanying order will be entered.

JOHN F. GERRY
CHIEF JUDGE

DATED: May 30, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5483, 91-5534

UNITED STATES OF AMERICA

v.

G. FRANKLIN LATHAM,

Appellant

(D.C. Criminal No. 90-00005-01)

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH, Circuit Judges, and GARTH, Senior Circuit Judge*

The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of the Court and to all the other available circuit judges in active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

s/Edward R. Becker
Circuit Judge

Dated: JUL 8 - 1992

*. As to panel rehearing only.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-5483 and 91-5534

UNITED STATES OF AMERICA

VS.

G. FRANKLIN LATHAM, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until October 16, 1992[.]

s/Edward R. Becker
Circuit Judge

Dated: July 24, 1992

Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

(2)

No. 92-658

In the Supreme Court of the United States

OCTOBER TERM, 1992

G. FRANKLIN LATHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction to review petitioner's interlocutory appeal from the denial of his post-trial motion for a judgment of acquittal.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-658

G. FRANKLIN LATHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unpublished, but the judgment is noted at 968 F.2d 15 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1992. The petition for rehearing was denied on July 8, 1992. Pet. App. D1-D2. The petition for a writ of certiorari was filed on October 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on five counts of making false claims to the United States government, in violation of 18 U.S.C. 287. Following the verdict, petitioner filed a motion for a judgment of acquittal under Fed. R. Crim. P. 29(c), or, in the alternative, for a new trial under Fed. R. Crim. P. 33. The district court denied the motion for a judgment of acquittal but granted the motion for a new trial. Pet. App. B1, C1-C84. The government appealed from the new trial order and petitioner cross-appealed from the denial of the motion for a judgment of acquittal. The court of appeals dismissed petitioner's appeal for lack of appellate jurisdiction and summarily affirmed the new trial order. Pet. App. A1-A2; 968 F.2d 15 (Table).

1. The evidence at trial showed that petitioner served as a controller for the United States Agency for International Development (AID) in San Salvador, El Salvador. In addition to their salaries, AID employees are entitled to payments or allowances as provided by the State Department's Standardized Regulations. At the relevant time, the Regulations provided for a special allowance in the event of the emergency evacuation or authorized departure of an AID employee or his dependents from El Salvador for military or other reasons of national interest or because of imminent danger to their lives. Pursuant to the regulations, an AID employee could be paid for any direct expenses incurred as a result of his evacuation or that of his dependents. Such direct added expenses from evacuation included a subsis-

tence expense allowance for a period of up to 180 days after the evacuation. Pet. App. C3-C4.

In the fall of 1987, while petitioner was working for AID in San Salvador, his son Stephen was attending college in Philadelphia, Pennsylvania. On November 25, 1987, Stephen traveled from Philadelphia to San Salvador to spend Thanksgiving with his father. On December 1, 1987, Stephen returned to Philadelphia. Stephen used a prepaid round trip airline ticket to travel to and from El Salvador. Pet. App. C4-C5.

On five occasions between February 26 and August 11, 1988, petitioner submitted travel vouchers and supporting documentation to AID claiming entitlement to direct added expenses for subsistence associated with the departure of his son from El Salvador. Petitioner knew that such expenses were not compensable under the Standardized Regulations. As a result of petitioner's false claims, the government paid $6,852.34 into petitioner's account at a New Jersey bank. Pet. App. C5-C6.

2. Following the verdict, petitioner moved the district court for either a judgment of acquittal or a new trial. In support of his acquittal motion, petitioner argued that the evidence was insufficient to show that (1) the documents he submitted to AID were "claims" within the meaning of 18 U.S.C. 287; (2) his request for special allowances in connection with his son's departure from El Salvador was false; or (3) he knew that the claims were false. The district court rejected those arguments and denied the motion for acquittal. Pet. App. C42-C58.

The district court granted petitioner's motion for a new trial. The court concluded that it had committed

plain error in failing to instruct the jury on the contents and meaning of the Standardized Regulations, which were admitted into evidence at trial. The court reasoned that such an instruction was necessary because "the Standardized Regulations gave rise to the controlling law of the case, and because the terms used in the Regulations are not within the realm of common understanding." Pet. App. C64.

3. The government appealed from the new trial order, and petitioner cross-appealed from the denial of his motion for judgment of acquittal. The court of appeals dismissed petitioner's cross-appeal for lack of appellate jurisdiction, Pet. App. A1-A2, and affirmed the order granting petitioner a new trial, 968 F.2d 15 (Table).

ARGUMENT

Petitioner contends (Pet. 12-32) that the court of appeals erred in dismissing his cross-appeal from the denial of his post-trial motion for judgment of acquittal. That claim merits no further review.

The courts of appeals "have jurisdiction of appeals from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court." 28 U.S.C. 1291. In criminal cases, a final judgment is not entered "until after conviction and imposition of sentence." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989). Because the district court granted petitioner's motion for a new trial, a final judgment has not yet been entered in this case.

This Court has recognized "a narrow exception to the normal application of the final judgment rule, which has come to be known as the collateral order

doctrine." *Midland Asphalt Corp.*, 489 U.S. at 798; see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Applying that doctrine, the Court has held that a defendant may take an interlocutory appeal from the denial of a "colorable" double jeopardy claim. *United States* v. *MacDonald*, 435 U.S. 850, 862 (1978); *Abney* v. *United States*, 431 U.S. 651, 662 & n.8 (1977). Petitioner attempts to avail himself of this exception to the general rule against interlocutory appeals by casting his challenge to the denial of his acquittal motion in double jeopardy terms. But that avenue of appeal is closed to petitioner because he never moved to dismiss the indictment on double jeopardy grounds. To the contrary, he moved for a new trial and the district court granted his motion.

Even if petitioner's motion for judgment of acquittal could be viewed as a motion to dismiss on double jeopardy grounds, petitioner would not have a colorable double jeopardy claim entitling him to interlocutory review. In *Richardson* v. *United States*, 468 U.S. 317 (1984), the defendant sought review of the denial of his motion for a judgment of acquittal following the declaration of a mistrial due to a hung jury. He argued that the Double Jeopardy Clause barred a retrial if there was insufficient evidence to convict at the first trial. In rejecting that claim, the Court made clear that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 468 U.S. at 325. The Court then concluded that "[r]egardless of the sufficiency of the evidence at [the] first trial, [the defendant] ha[d] no valid double jeopardy claim"

because "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy." *Id.* at 326. The Court added that "[i]t follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer 'colorable' double jeopardy claims which may be appealed before final judgment." *Id.* at 326 n.6. See also *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 304-313 (1984) (under Massachusetts' two-tier system of trial courts, a defendant's retrial *de novo* without any judicial determination of the sufficiency of the evidence at his prior bench trial does not violate the Double Jeopardy Clause).

Petitioner filed a motion for a new trial and the district court granted that motion. Petitioner's position is thus no different for purposes of the Double Jeopardy Clause from that of a defendant who faces a new trial because the jury failed to reach a verdict; both defendants are subject to continuing jeopardy. In light of *Richardson*, petitioner's retrial would not violate the Double Jeopardy Clause even if the evidence at the first trial was insufficient to support his convictions. Accordingly, petitioner does not have a colorable double jeopardy claim entitling him to immediate appellate review.

The Tenth Circuit's decision in *United States* v. *Wood*, 958 F.2d 963 (1992), is directly on point. In *Wood*, as in this case, the district court, following a guilty verdict, denied the defendant's motion for judgment of acquittal but granted his motion for new trial. Like petitioner, the defendant took an interlocutory appeal, arguing that retrial was barred by the Double Jeopardy Clause because of the insufficiency

of the evidence. The court of appeals, relying on *Richardson*, held that the defendant had no cognizable double jeopardy claim. 958 F.2d at 968-971. Although the court denied the government's motion to dismiss the defendant's appeal for lack of jurisdiction, it went on to state that "[o]ur resolution of the merits of Defendant's claims makes future double jeopardy claims like Defendant's non-colorable and, therefore, subject to summary dismissal when asserted on an interlocutory appeal." *Id.* at 972 n.12.

Petitioner's reliance on *United States* v. *Szado*, 912 F.2d 390 (9th Cir. 1990), does not help him. In that case, the district court reversed the defendant's conviction before a magistrate because the defendant had been denied the right to a jury trial. The court declined, however, to address the defendant's claim that the evidence was insufficient to support his conviction. The defendant took an appeal to the Ninth Circuit, arguing that the district court's failure to decide whether the evidence was sufficient compromised his double jeopardy rights, since a finding of evidentiary insufficiency would have precluded a retrial. In these circumstances, the court of appeals held that it had jurisdiction under the collateral order doctrine, 912 F.2d at 391-393, and that the district court should have reviewed the defendant's challenge to the sufficiency of the evidence, *id.* at 393-394.

Szado differs significantly from this case. In the first place, Szado's appeal, unlike petitioner's, was not from the denial of an acquittal motion; it was from the denial of a motion for reconsideration raising a double jeopardy claim. 912 F.2d at 391. Moreover, in *Szado* the district court declined to address the defendant's

challenge to the sufficiency of the evidence instead of rejecting it, as the district court rejected petitioner's challenge here. As a result, the defendant in *Szado* had a colorable double jeopardy claim in light of Ninth Circuit decisions holding that, when a defendant asserts a claim of evidentiary insufficiency on appeal, the claim must be reviewed even if there are other grounds for reversal. See *id.* at 393. If the district court in *Szado* had addressed and rejected the defendant's insufficiency of the evidence claim, *Richardson* would have prohibited the court of appeals from reviewing it on appeal because of the pendency of the new trial.

Nor is petitioner helped by *United States* v. *Greene*, 834 F.2d 86 (4th Cir. 1987), on which he also relies. There, as here, the district court simultaneously denied the defendant's post-trial motion for a judgment of acquittal and granted his motion for a new trial. After holding that it had jurisdiction to review the defendant's double jeopardy challenge to the retrial, which rested on the alleged insufficiency of the evidence at the first trial, the court went on to review the evidence and to find it sufficient. 834 F.2d at 89. In so doing, however, the court did not consider whether the defendant had a cognizable double jeopardy claim nor did it even mention *Richardson*.

We doubt that the *Greene* court's willingness to review the sufficiency of the evidence would survive a consideration of *Richardson*. In any event, *Greene* should not be construed as rejecting an argument—that *Richardson* precluded interlocutory review of the defendant's double jeopardy claim—that was neither raised by the government, see 834 F.2d at 87,

nor addressed by the court of appeals. Moreover, the *Greene* court premised its jurisdictional holding not on the denial of the defendant's motion for a judgment of acquittal, but on the denial of his motion to dismiss the indictment on double jeopardy grounds. 834 F.2d at 89. As discussed above, there was no such motion in this case.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1992

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* Petitioner argues (Pet. 24-25) that the court of appeals' action put him in a worse position than "the person whose post-trial motions are wrongly denied in their entirety," since such a person "can raise both claims on direct appeal after sentencing and is then entitled to have the sufficiency issue decided first." It was petitioner himself, however, who chose to ask the district court to order a new trial. Had petitioner not made that request, he could have raised both his challenge to the sufficiency of the evidence and his challenge to the jury instructions on direct appeal.